Appeal No: 24-11764

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TESSA G.,
PLAINTIFF-APPELLANT,

v.

XAVIER BECERRA,
Secretary, United States Department of
Health and Human Services,
DEFENDANT-APPELLEE.

OPENING BRIEF OF PLAINTIFF-APPELLANT TESSA G.

On Interlocutory Appeal of an order from the United States District Court
for the Northern District of Georgia.
Case No. 1:23-cv-02665-LMM-RGV

Respectfully Submitted,

/s/ [redacted] a/k/a Tessa G.
Plaintiff-Appellant, *Pro Se*
Phone: (404) 939-2076
Email: alias.tessa.g@gmail.com

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, Plaintiff-Appellant Tessa G. certifies that the following persons and entities may have an interest in the outcome of this appeal:

1. Au, Janei (former counsel for Plaintiff during EEOC appeal process)
2. Bagenstos, Samuel R. (General Counsel, U.S. Department of Health and Human Services)
3. Becerra, Xavier (Secretary, U.S. Department of Health and Human Services)
4. Ben-David, Neeli (counsel for Defendant)
5. Buchanan, Ryan K. (U.S. Attorney for Northern District of Georgia)
6. Cohen, Mandy (Director, Centers for Disease Control and Prevention)
7. D'Agostino, Debra (former counsel for Plaintiff during EEOC appeal process)
8. Eichenholz, Keith (counsel for Defendant)
9. Epilepsy Foundation of America
10. G., Tessa, Plaintiff-Appellant (pseudononymous)
11. Garland, Merrick B., Attorney General of the United States
12. Gillis-Gilbertz, Pamela S. (former president, AFGE local union 2883)
13. May, Hon. Leigh Martin, United States District Court Judge
14. Mendel, Gabriel (counsel for Defendant-Appellee)

15. Penn, Matthew (Responsible Management Official of Defendant-Appellee)

16. United States Attorney's Office, Northern District of Georgia

17. United States Department of Health and Human Services, Defendant-Appellee

18. United States Department of Justice

19. United States Equal Employment Opportunity Commission

20. Vineyard, Hon. Russell G, United States Magistrate Judge

21. Williams, Melaine (counsel for Defendant)

No publicly traded company or corporation has an interest in the outcome of this appeal.

/s/ [redacted] a/k/a Tessa G.

Plaintiff-Appellant, *Pro Se*

STATEMENT REGARDING ORAL ARGUMENT

The issues in this appeal are sufficiently presented in Plaintiff-Appellant's opening brief herein. Plaintiff-Appellant submits that oral argument is not necessary to resolve the issues in this appeal and would thus likely not enhance the court's decision-making process.

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STATEMENT OF JURISDICTION

This is an interlocutory appeal from an order from the U.S. District Court of the Northern District of Georgia ("District Court") overruling Plaintiff-Appellant's Objection to the magistrate judge's denial of Plaintiff-Appellant's motion to proceed pseudonymously,[1] entered on April 24, 2024 at DKT 26.

Plaintiff-Appellant Tessa G. (hereinafter referred to as Plaintiff or "Tessa"), so pseudo-named by the Equal Employment Opportunity Commission in its publication of an appellate decision in the administrative complaint that preceded the subject Complaint filed in the District Court,[2] is seeking interlocutory relief over the District Court's Orders denying Plaintiff's motion to proceed anonymously under a pseudonym, DKT 26 and DKT 4. This court's jurisdiction was invoked by the timely filing of a Notice of Appeal on May 23, 2024, DKT 27.

The jurisdiction of the District Court in the Complaint below is based upon 28 U.S.C. § 1331 and 1343 because this action arose under the laws of the United States, i.e., the Rehabilitation Act of 1973, 29 U.S.C. § 791. *See* DKT 15 ¶ 4-6. This court has jurisdiction over this appeal under 28 U.S.C. § 1291. Further, "[A] district court's order denying anonymity for a party is a final appealable order

[1] Plaintiff's initial motion to proceed anonymously in this Complaint was styled as Motion to File this Complaint and Associated Pleadings and Submissions Using Alias Assigned by EEOC During Administrative Processing, DKT. 2.
[2] *See* DKT 1 at 41, Tessa G. v. HHS, EEOC Appeal No. 2020004613 (Aug. 29, 2022).

under the collateral order doctrine." Plaintiff B. v. Francis, 631 F.3d 1310, 1314-1315 (11th Cir. 2011), *citing* Doe v. Stegall, 653 F.2d 180, 183 (5th Cir. Unit A Aug. 1981).

STATEMENT OF THE ISSUE

Whether the District Court abused its discretion in denying Tessa's unopposed motion to proceed anonymously due to the confidentiality of her epilepsy diagnosis, when it failed to consider all the circumstances, privacy interests and stigma at issue in this case?

STATEMENT OF THE CASE AND FACTS

Abreviated statement of facts

As set forth in the Complaint filed in the District Court on June 14, 2023,[3] the facts giving rise to the Complaint, and the Equal Employment Opportunity Commmision ("EEOC") complaint preceding the instant case in the District Court, began soon after Plaintiff disclosed her epilepsy to her employer, the Centers for Disease Control and Prevention of the U.S. Department of Health and Human Services (hereinafter referred to as "Agency" or "Defendant"). DKT 1, ¶ 96-120

Shortly after Plaintiff's epilepsy disclosure, while Plaintiff was on medical leave for her epilepsy, the Agency recruited Plaintiff's replacement, and thereafter caused Plaintiff to train her replacement, removed Plaintiff from her project manager position and terminated her employment in sequence. Complaint, DKT 15, ¶ 96- 148. Thereafter, Defendant retaliated against Plaintiff for commencing the EEO complaint process by disparaging her to others in her professional field outside the Agency. Complaint, DKT 15, ¶ 156-157; 192-196. Plaintiff faced increasing difficulty locating alternative employment either with the federal government or in her professional field more broadly due to the combined effects of the retaliation and her blemished employment record having been terminated

[3] Plaintiff filed her original Complaint with the District Court on June 14, 2023, DKT 1, and her Amended Complaint on January 31, 2024, DKT 15.

from the Agency. *See* Complaint, DKT 51, ¶ 184; 192-196.

After extreme delays in the EEOC's processing of the Complaint, although Plaintiff prevailed before the EEOC on the merits of her discriminatory termination and retaliation claims, the EEOC withheld all restorative relief ordinarily awarded to prevailing plaintiffs in discriminatory termination cases, and nearly all equitable relief. This was despite the vast long-term harm the discrimination and retaliation thereafter caused in upending the career and life Plaintiff had spent many years working to establish for herself, the effects of which she still significantly and actively lives with through the present.

Proceedings Below

The Complaint Plaintiff filed in the District Court below is bound up with the preceding administrative proceeding before the EEOC, which eventually resulted in a published federal sector appellate decision, Tessa G. v. HHS, EEOC Appeal No. 2020004613 (Aug. 29, 2022).[4] The EEOC published the appellate decision that publicly referred to Plaintiff by a randomly-generated alias, "Tessa G." in order to maintain Plaintiff's confidentiality pursuant to EEOC policy.[5]

[4] *NOTE*: a copy of the EEOC appellate decision is attached to Plaintiff's original Complaint at the District Court filed on June 14, 2023, DKT 1 at 41.

[5] The EEOC publishes its appellate decisions, which involve federal employees, using pseudonyms to refer to complainants due to Privacy Act restrictions on the disclosure by the federal government of personnel records and personal information of federal employees. *See* U.S. Equal Employment Opportunity Commission, "Open Government Plan," Version 4.0, July 2016. Available at:

Tessa filed her original Complaint in this matter with the District Court following the EEOC's March 2023 denial of her request for reconsideration of its August 2022 appellate decision affirming an EEOC Administrative Judge's decision to withhold all restorative and nearly all equitable relief.[6] After Tessa had requested reconsideration of such denial by the EEOC commissioners primarily due to new relevant evidence Plaintiff obtained subsequent to the EEOC's publication of its appellate decision in Plaintiff's EEOC complaint, the EEOC's Office of Federal Operations ("OFO") told Tessa via email in May 2023 that if she was dissatisfied with the relief she received, she should take her complaint to federal court.

Plaintiff followed that suggestion and thus filed a Complaint with the District Court on June 14, 2023 (DKT 1). Plaintiff's Complaint[7] sets forth four claims of discrimination and retaliation under the Rehabiliation Act: discriminatory termination (Count I), failure-to-accommodate (Count II), retaliation (Count III),

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https://www.eeoc.gov/us-equal-employment-opportunity-commission-eeoc-open-government-plan (accessed July 31, 2024)

[6] *NOTE*: As Plaintiff explained in her response to Defendant's motion to dismiss the Complaint, Plaintiff did not include claims for failure-to-accommodate or illegal disclosure in her original EEO Complaint in February 2015 because Plaintiff did not have a full understanding of what constitutes failure to accommodate at that time as she developed in the years since, and that the facts underlying Plaintiff's discriminatory termination claim also constituted failure-to-accommodate by the Defendant. Plaintiff moreover did not become aware of the Agency's disclosure of her confidential health status to others until she received the Agency's Report of Investigation, after a long delay and well into the EEOC administrative process.

[7] Both Plaintiff's original Complaint, DKT 1, and Amended Complaint, DKT 15.

and illegal disclosure (Count IV) . DKT 15. Because Plaintiff went from the EEOC to federal court, Plaintiff also added a fifth claim of deprivation of due process under the Fifth Amendment based entirely on the manner in which the Agency terminated Plaintiff with zero prior notice before the termination occurred, irrespective of the underlying grounds or discriminatory reasons for her termination. DKT 15. ¶ 230-245

Defendant-Appellee filed motions to dismiss Plaintiff's Complaints[8] in this matter under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on grounds unrelated to Plaintiff's request to proceed in her Complaint anonymously.[9] The Secretary did not file an opposition to Plaintiff's request to proceed pseodonymously.[10] Before Defendant HHS Secretary had filed his (first) motion to dismiss with the District Court, counsel for Secretary Becerra communicated with Plaintiff regarding the Government's extension request, and told Plaintiff via email on November 15,

[8] Plaintiff filed her First Amended Complaint on January 31, 2024, Dkt. 15, which Defendant then moved to dismiss on February 14, 2024.

[9] Defendant requested dismissal of Plaintiff's discriminatory termination and retaliation claims (Counts I and III) in the Complaint that were addressed by the EEOC, arguing that Plaintiff's receipt of a monetary award from the EEOC complaint (however limited) resolved, and precluded the District Court's jurisdiction, over those claims. The Government further moved to dismiss Plaintiff's claims of failure to accommodate, illegal disclosure, and deprivation of due process under the Fifth Amendment, for Plaintiff's alleged failure to state a claim.

[10] *Further note*: The Secretary filed at DKT 17 a Motion to Seal portions of the Agency's Report of Investigation. That followed his filing the ROI via ECF as an exhibit to his Motion to Dismiss without sealing or fully redacting Plaintiff's personally identifiable information (PII) before submission; Plaintiff had flagged that filing with the Secretary and the District Court immediately after it was filed as violating the Privacy Act.

2023 that, "We do not take a position regarding your request [to proceed pseudononymously]."

On April 24, 2024, the District Court overruled Plaintiff's Objection to the Magistrate's ruling denying Plaintiff's motion to proceed anonymously with the Complaint. DKT 26.[11] That Order by the District Court, again denying Plaintiff's request to proceed anonymously, triggered the instant Appeal.

Tessa submits this interlocutory Appeal seeking relief from the District Court orders (DKT 26 & DKT 4), in which the District Court abused its discretion by denying Tessa's request to proceed anonymously in the Complaint to maintain the confidentiality of her epilepsy diagnosis. The District Court's orders denying Plaintiff's motion to proceed anonymously, in their effect, require Tessa to publicly disclose her epilepsy diagnosis to continue with her Complaint. As noted previously and as Tessa emphasized in her initial motion to proceed anonymously, it was the very disclosure of her epilepsy to her (government) employer that resulted in the underlying discrimination for which Tessa seeks full redress through her Complaint. *See* DKT 2.

[11] Since the instant Appeal was docketed with this Court, on July 22, 2024 the Magistrate Judge issued a non-final Report and Recommendation recommending that Defendant's Motion to Dismiss Plaintiff's Complaint (DKT 16) be granted in part and denied in part. *See* DKT 32.

STANDARD OF REVIEW

This Court will "[R]eview a district court order denying a party's motion to proceed anonymously for abuse of discretion." Doe v. Neverson, 820 Fed. Appx. 984, 986 (11th Cir. 2020), *citing* Plaintiff B. v. Francis, 631 F.3d 1310, 1315 (11th Cir. 2011). "However, 'if the trial court's ruling is based upon an error in law it is freely reviewable on appeal.'" Plaintiff B. v. Francis, 631 F.3d at 1315, *citing* Doe v. Stegall, 653 F.2d 180, 183 (5th Cir. Unit A Aug. 1981). Further, "A district court abuses its discretion in denying a motion to remain anonymous if it fails to actually consider the circumstances of the case and to weigh the relevant factors and instead follows a blanket rule in making its final decision." Id.

SUMMARY OF THE ARGUMENT

As the courts have emphasized, open access to all the information and facts involved in lawsuits and judicial proceedings is essential to maintaining the public's trust. However, that 'presumption of openness' in litigation is not absolute, and must be weighed against the privacy interests of a plaintiff seeking anonymity. In this case, Plaintiff's substantial privacy interest in maintaining the confidentiality of her medical diagnosis of epilepsy is also grounded in the Constitution, and her health status of epilepsy is information of "utmost intimacy" justifying anonymity in this Complaint. This is especially true because not only has Plaintiff never publicly disclosed her confidential epilepsy diagnosis, but that health information in the Complaint cannot practicably redacted or sealed from public view given how central her epilepsy diagnosis is to the instant Complaint.

Not only is Plaintiff's medical diagnosis constitutionally-protected private information and which Plaintiff cannot be compelled to disclose as a prerequisite for seeking redress for government wrongdoing, but Plaintiff's epilepsy diagnosis is also information of the "utmost intimacy" because of the severe stigma that is still attached to epilepsy.

In denying Plaintiff-Appellant's motion to proceed anonymously in the Complaint, the District Court abused its discretion by failing to actually weigh all the circumstances and privacy interests at issue in this case when assessing

whether Plaintiff's privacy interests in the confidentiality of her epilepsy diagnosis outweigh the presumption of openness in litigation. For example, the District Court did not actually consider not only that Plaintiff's instant Complaint is bound up with an administrative EEOC proceeding and published appellate decision where Plaintiff was anonymous. But where the EEOC published not just Plaintiff's epilepsy status, but other significant personal information in reliance on the anonymity of that appellate decision due to the restrictions of the Privacy Act on the federal government's disclosure of the personal information of individuals. If Plaintiff were denied anonymity in the instant Complaint, the anonymity and privacy constraints under which the EEOC published its appellate decision in the preceding EEOC administrative complaint would be unraveled.

The District Court furthermore erred by misapplying this Court's legal standard for permitting anonymity in cases where disclosure would involve significant stigma. Instead of applying this Court's legal standard allowing anonymity in cases where disclosure would involve stigma, the District Court abused its discretion when it faulted Plaintiff for not citing to a prior case where a court held epilepsy to be information of "utmost intimacy," and thus overruled Plaintiff's objection to the Magistrate Judge's initial denial of Plaintiff's motion to proceed anonymously in the Complaint. For these reasons, the District Court abused its discretion.

ARGUMENT

I. Plaintiff's privacy interest in maintaining the confidentiality of her epilepsy diagnosis outweighs the strong presumption of openness in litigation

Open access to the courts is fundamental to the public's trust in the legal system and has First Amendment implications. Plaintiff B. v. Francis, 631 F.3d 1310 (11th Cir. 2011). However, like other Constitutional rights, the public's right to strong and open access to the courts is not unlimited, Id; and must be balanced against countervailing interests. The Plaintiff's right to the privacy of her confidential health information, especially her epilepsy diagnosis, is indeed substantial, and is also constitutionally embedded. For the reasons below, Tessa's privacy interests in this case outweigh the strong presumption of openness in litigation.

A. The law governing anonymity in litigation

Federal Rules of Civil Procedure 10(a) provides in relevant part that "The title of the complaint must name all the parties." Fed. R. Civ. P. 10(a). "'This rule serves more than administrative convenience. It protects the public's legitimate interest in knowing all of the facts involved, including the identities of the parties.'" Plaintiff B. v. Francis, 631 F.3d 1310, 1315 (11th Cir. 2011) *citing* Doe v. Frank, 951 F.2d 320, 322 (11th Cir. 1992). "This creates a strong presumption in

favor of parties proceeding in their own names." Id. This rule, however, is not absolute.

In this Court, "a party may proceed anonymously in a civil suit in federal court by showing that [s]he 'has a substantial privacy right which outweighs the 'customary and constitutionally-embedded presumption of openness in judicial proceedings.'" Id.

In considering a motion to proceed anonymously and weighing the privacy rights of a party against the presumption of openness, a district court *first* considers whether the party seeking anonymity: 1) is challenging governmental activity; 2) will be required to disclose information of "utmost intimacy"; *or* 3) would be compelled, absent anonymity, to admit intent to engage in illegal conduct and thus risk criminal prosecution. Plaintiff B. v. Francis, 631 F.3d 1310, 1316 (11th Cir. 2011) (*emphasis added*). These (first) three factors are part of the test set forth in S. Methodist Univ. Ass'n of Women Law Students v. Wynn & Jaffe, 599 F.2d 707, 712-713 (5th Cir., 1979), known as the "SMU" test. This Court has included such matters as abortion, birth control, and religion as constituting information of "utmost intimacy". Plaintiff B. v. Francis, 631 F.3d 1310 (11th Cir. 2011).[12]

[12] *Note*: In this Court's earlier decision Doe v. Frank, 951 F.2d 320 (1992), this Court did not characterize that plaintiff's "alcoholism" as "health information," and neither does that plaintiff appear to have done so.

Because the SMU test is only the *first* step in evaluating whether to permit a plaintiff to proceed anonymously, this Court has directed district courts to next consider other *non-exhaustive* factors *after* reviewing the three-part SMU test, including, (a) whether the plaintiff is a minor, (b) whether plaintiff was or will be threatened with violence or physical harm by proceeding in her own name, and (c) whether plaintiff's anonymity poses a unique threat of fundamental unfairness to the defendant. Doe v. Sheely, 781 F.App'x 972 (11th Cir. 2019) (*emphasis added*). As this Court has further advised courts, "And even aside from these factors, we have made clear the court "should carefully review *all* the circumstances of a given case and then decide whether the customary practice of disclosing the plaintiff's identity should yield to the plaintiff's privacy concerns." Id at 974, *citing* Doe v. Frank 951 F.2d 320, 323 (11th Cir. 1992).

B. Plaintiff's epilepsy diagnosis is also information of the 'utmost intimacy' because it is confidential health information in which Plaintiff has a substantial and constitutionally-embedded privacy interest

Individuals have a constitutionally-embedded right to the privacy of their confidential health information that must be properly factored into a court's assessment of whether a party's privacy interests are substantial enough to outweigh the presumption of openness in litigation where a party's confidential health information is central to a complaint.

As this Court stated, "In *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), the Supreme Court recognized a constitutional interest 'in avoiding disclosure of personal matters.'" Burns v. Warden, 482 F. App'x 414, 417 (11th Cir. 2012), *citing* Whalen v. Roe, 429 U. S. 589, 599 (1977). Furthermore, "The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality." Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F. 3d 1260, 1269 (9th Cir. 1998), *citing* Doe v. Attorney General of the United States, 941 F.2d 780, 795 ((9th Cir.1991) *citing* Whalen v. Roe, 429 U. S. 589 (1977)).

This is not to say that all plaintiffs in cases involving a private medical issue are presumptively entitled to anonymity in litigation. As several courts have noted, in some cases a party's medical information disclosed in litigation can be sealed, redacted or subjected to a protective order to prevent public disclosure of such health information thus rendering anonymity of the party unnecessary. *See* L. R. v. Cigna Health & Life Ins. Co., 6:22-cv-1819-RBD-DCI (M.D. Fla. Jul. 11, 2023), noting that medical information at issue in litigation may be sealed. In other cases, if a party previously publicly disclosed their own health information (e.g., by informing the media of their lawsuit that concerns their health status and thereby identifying themselves and their health information), then anonymity would not be justified even if their case concerns their health status.

However, in cases like the instant one where a party's (confidential) medical diagnosis is a fundamental part of a complaint, and where that health information cannot be practicably sealed or redacted from the rest of the complaint to prevent public disclosure of such health information, then said health information should be regarded as information of "utmost intimacy" in the three-part SMU test above. If such matters as religion, birth control, and abortion constitute information of "utmost intimacy," then one's confidential medical diagnosis[13] should likewise be considered such in the context of the SMU test—especially given the right to the privacy of one's health information that is protected by the Constitution per Whalen v. Roe, 429 U. S. 589 (1977), along with (the principles of) federal statutes such as HIPAA.[14] Indeed, the First Circuit has recognized that "medical concerns" are "intimate issues" alongside "[S]exual activities, reproductive rights, [and] bodily autonomy." Doe v. MIT, 46 F.4th 61, 66 (1st Cir., 2022).

In Doe v. DeKalb Cnty Sch. Dist., 145 F.3d 1441 (11th Cir. 1998), for example, although this Court did not cite the SMU test or expressly analyze whether that plaintiff's privacy interest in the confidentiality of his HIV status

[13] As Plaintiff stated previously, the confidentiality of such health information would be based on a party not having previously publicly disclosed their health status at issue, and where such private health information cannot be concealed from public view by redacting or sealing that specific information in a case.

[14] Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d–6
NOTE: While HIPAA is not directly applicable to the instant Complaint because Defendant is not a covered healthcare entity, it is the broader principle of individuals' right to health privacy underlying the Privacy Rule of HIPAA that is generally applicable.

outweighed the presumption of openness in litigation, where his HIV status was plainly a central aspect of that complaint, this Court noted that plaintiff was permitted to proceed anonymously to protect his privacy interests. Id.

In the instant case, like in Doe v. DeKalb County, the District Court in effect acknowledged it would not possible to conceal Tessa's epilepsy diagnosis from the Complaint and public view by redacting or sealing that information, given how central her epilepsy status is to the Complaint. *See* DKT 26 at 4.[15] Although Plaintiff, to the best of her research and knowledge,[16] is not aware of any (other) case (across jurisdictions) where a court assessed whether one's epilepsy diagnosis is information of "utmost intimacy," Plaintiff did come across another decision analogous to this Court's decision in Doe v. DeKalb Cnty Sch. Dist., 145 F.3d 1441 (11th Cir. 1998). Like in the Dekalb Cnty case (Id), in the other case a plaintiff whose employment discrimination complaint centered around their epilepsy[17] was granted anonymity—but that court did not address or discuss the privacy and anonymity issue, and thus appeared to presume that plaintiff had a

[15] ***NOTE***, this would be even if this Complaint was not preceded by an administrative complaint proceeding that resulted in a published appellate decision, in which Plaintiff's epilepsy diagnosis, along with other personal information, was disclosed but where Plaintiff was referred to by pseudonym Tessa G. *See* DKT 1 at 35.

[16] Plaintiff searched Westlaw, Lexis-Nexis, and Google Scholar for cases containing both the terms "epilepsy" and "utmost intimacy" (without date restrictions). The instant case is the only case containing both such terms to currently appear in results of said search in Westlaw and Lexis-Nexis.

[17] "Seizure disorder" is widely accepted as a synonymous term for epilepsy.

privacy interest in the confidentiality of his epilepsy status. *See* Doe v. Mylan Pharms., Inc., *2017 U.S. Dist. LEXIS 47820* (N.D.W.V. Mar. 30, 2017).

Because Plaintiff has a right to the privacy of her confidential health information and medical diagnoses, a principle that is grounded in both the Constitution (Whalen v. Roe, 429 U.S. 589) and in the U.S. Code,[18] and because it is not possible to conceal Plaintiff's epilepsy diagnosis from public disclosure in the Complaint, Plaintiff has a substantial interest in the privacy of her medical diagnosis. Such information should thus constitute information of "utmost intimacy" under this Court's test for determining whether plaintiffs should be granted anonymity in litigation, alongside such matters as birth control and religion per Plaintiff B. v. Francis, 631 F.3d 1310 (11th Cir. 2011).

C. The Stigma of epilepsy is sufficiently severe that it separately justifies anonymity to avoid public disclosure of Plaintiff's epilepsy diagnosis

In her motion to proceed anonymously (DKT 2) and her Objection to the Magistrate Judge's Order denying said request (DKT 5), Plaintiff's primary reason for requesting anonymity, beyond the privacy of her medical information, was the severe stigma attached to epilepsy.[19]

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[18] HIPAA, the Rehabilitation Act, the Americans with Disabilities Act, and the Privacy Act, and/or their implementing rules, all contain provisions, among others, protecting the personal information of individuals that include, directly and/or indirectly, health information.

[19] *NOTE*: Although Plaintiff did not cite "embarrassment" of her epilepsy as a factor to warrant anonymity that she requested to proceed with her Complaint (*see* DKT 2), the District Court in its initial denial of Plaintiff's initial motion to proceed anonymously

Plaintiff referenced extensive scholarly and legal sources documenting the widely-acknowledged, longstanding severe stigma that still persists around epilepsy. *See* DKT 5. For example, as Plaintiff had noted, one such legal scholar who has addressed stigma and acknowledged the severity of epilepsy stigma, is Samuel Bagenstos, the current General Counsel for Defendant Xavier Becerra.[20] Specifically, Prof. Bagenstos quoted the Congressional testimony of a prominent disability rights expert, Arlene Mayerson, who in urging Congress to pass the Americans with Disabilities Act of 1990, cited a study finding the hostility toward epilepsy is so strong "that personnel directors would prefer to hire a former prison inmate or mental hospital patient [rather] than an epileptic."[21] The Defendant Agency itself has also referred to the stigma surrounding epilepsy in its Morbidity and Mortality Weekly Report, *noting that* "Epilepsy poses challenges because of uncontrolled seizures, treatment complexity, social disadvantages (e.g., unemployment), and stigma."[22] More recently, as the Legal Director of the

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(mis)characterized Plaintiff's reference to the stigma surrounding epilepsy as "embarrassment." DKT 4 at 8-10.

[20] As Plaintiff noted in her Objection to the Magistrate's initial denial of anonymity (DKT 5), Prof. Bagenstos cited such stigma in scholarly work in his capacity as a law professor years before he became HHS General Counsel.

[21] Samuel Bagenstos, *Subordination, Stigma, and "Disability*," 86 VA. L. REV. 397, 471, 502 (2000), *citing* Americans with Disabilities Act: Hearing Before the House Committee on Small Business, 101st Cong. 126–39 (1990) statement of Arlene Mayerson) (collecting studies); H.R. Rep. No. 101-485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 353.

[22] *See* Centers for Disease Control and Prevention, *Comorbidity in Adults with Epilepsy — United States, 2010* Morbidity and Mortality Weekly Report, 62(43);849-853, November 1, 2013. Available at:

Epilepsy Foundation of America, Alison Nichol, put it in a 2020 story about another epilepsy discrimination case, "'The stigma and discrimination faced by people with epilepsy is much worse than a lot of other disabilities.'"[23] The Supreme Court earlier acknowledged the stigma that persists around epilepsy. *See* School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 284 (1987).[24]

It is beyond refute that the stigma surrounding epilepsy is severe and persistent. The District Court, in its Order overruling Plaintiff's objection to the Magistrate Judge's order denying Plaintiff's motion to proceed anonymously, ultimately acknowledged there is stigma surrounding epilepsy. DKT 26 at 4.

However, because no case that Plaintiff is aware of expressly addressed whether one's epilepsy status is information of the "utmost intimacy"—or directly assessed whether the stigma surrounding epilepsy specifically justifies anonymity in a complaint involving someone's epilepsy diagnosis—Plaintiff applied the analogy of the severe stigma surrounding epilepsy to the stigma surrounding other conditions such as HIV and mental illness. DKT 5. Indeed, if the stigma surrounding epilepsy is comparable to HIV[25] –or sometimes *even more severe* than

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https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6243a2.htm (accessed July 31, 2024).

[23] David Wildstein, New Jersey Globe, "Newspaper pulls job offer after learning woman had epilepsy, lawsuit alleges," Jan. 30, 2020 available at: https://newjerseyglobe.com/judiciary/newspaper-pulls-job-offer/ (accessed Aug. 1, 2024)

[24] Plaintiff inadvertently omitted reference to this case in her prior filing.

[25] See, e.g., Paula T. Fernandes et al., "Prejudice towards chronic diseases: comparison among epilepsy, AIDS and diabetes." *SEIZURE* vol. 16,4 (2007): 320-3.

that of mental illness as the research Arlene Mayerson cited to Congress found[26]—if plaintiffs may be afforded anonymity when mental illness is at issue in complaints, then a plaintiff whose epilepsy diagnosis is at the center of a complaint should similarly be granted anonymity.

D. The harm to Plaintiff from public online disclosure of Plaintiff's epilepsy status would significantly exceed the harm to the public of not knowing Plaintiff's identity

As noted previously, in this Court, "A party may proceed anonymously in a civil suit in federal court by showing that [s]he 'has a substantial privacy right which outweighs the 'customary and constitutionally-embedded presumption of openness in judicial proceedings.'" Id. *citing* Doe v. Frank, 951 F.2d 320, 323 (11th Cir. 1992). Where a party's right to the privacy of their confidential health information must be balanced against the public's right to the openness of litigation, it is appropriate to furthermore assess whether the plaintiff stands to be harmed more from public disclosure of their private information, or the public from not knowing the real identity of the party.

The harm that the Plaintiff would face from public (online) disclosure of her (confidential) epilepsy diagnosis would be severe, and would rival the vast harm

[26] *See* Americans with Disabilities Act: Hearing Before the House Committee on Small Business, 101st Cong. 126–39 (1990) statement of Arlene Mayerson) (collecting studies); H.R. Rep. No. 101-485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 353

Plaintiff has suffered and continues to experience from the discrimination and thereafter retaliation to which Plaintiff was subjected following her disclosure of her epilepsy to her employer the Agency. Absent anonymity, if Plaintiff proceeded in this Complaint under her name, anyone from potential employers to prospective romantic partners or even landlords could forever ascertain Plaintiff's (confidential and highly stigmatized) medical diagnosis merely by searching her name online and finding this Complaint, even before meeting or acquiring other information about her. Plaintiff would never be able to choose whether to disclose her (confidential) epilepsy status to others. The effects of that (indefinite) harm would exacerbate and rival the severe harm of the Agency's discrimination and retaliation Plaintiff is still experiencing, and which Plaintiff seeks to redress not merely through monetary damages, but through significant equitable, injunctive and declaratory relief she seeks in her Complaint. *See* DKT 15 at 43-46.

As the court noted recently in Doe v. Metro. Gov't of Nashville, No. 3:23-CV-00736, 2023 WL 6211372 (M.D.TN Sep. 25, 2023), in granting that plaintiff anonymity due to the confidentiality of his HIV status:

> More compelling to the Court is Plaintiff's argument that requiring disclosure of his identity would also make his HIV-positive status readily available to potential future employers, in contravention of the ADA's restriction on employers' pre-offer access to an applicant's health information.

Id. at 5, *citing* Harrison v. Benchmark Elec. Huntsville, 593 F.3d 1206 (11th Cir.

2010). Indeed, public disclosure and immediate availability of Plaintiff's epilepsy status to prospective employers, along with so many others, would similarly frustrate the purpose of the ADA, and is a very high price for seeking justice, from the government no less.

Although the public would suffer some measure of loss in the form of a limitation on access to (otherwise public) information, it is comparable to the limitation on the availability of information under exceptions to other open-information laws such as the Freedom of Information Act ("FOIA").[27] Such limitation on the public's access to the information of Plaintiff's identity is not commensurate in harm to that which Plaintiff would forever be subjected through public disclosure of her epilepsy diagnosis.

Moreover, the public has a greater interest in cases such as the instant Complaint being resolved on the underlying issues, and in justice being rendered, than the public's interest in the specific identity of Plaintiff. "The public has a substantial interest in ensuring that those who would seek justice in its courts are not scared off by the specter of destructive exposure." Doe v. MIT, 46 F.4th 61, 66 (1st Cir., 2022), *citing* Cf. Doe v. Megless, 654 F.3d 404, 410 (3rd Cir. 2011).

The harm to the Plaintiff from public disclosure of her epilepsy diagnosis

[27] Freedom of Information Act, 5 U.S.C. § 552

would significantly outweigh the harm to the public by concealing Plaintiff's identity in this Complaint due to the confidentiality of Plaintiff's epilepsy status.

II. The District Court abused its discretion in denying Plaintiff's request to proceed anonymously in the Complaint below notwithstanding the relevant legal standards and all the circumstances of the Complaint

In denying Plaintiff permission to proceed pseudonymously in the Complaint below (DKT 4 and DKT 26), the District Court abused its discretion by failing to properly consider *all* the circumstances of the Complaint, and by misapplying the relevant legal standards for determining when anonymity is justified.

A. The District Court did not actually weigh all the circumstances of the Complaint

As noted above, this Court requires that, aside from the six aforementioned factors for courts to consider as a starting point in assessing whether a plaintiff has a substantial privacy right that outweighs the presumption of openness, courts "'Should carefully review all the circumstances of a given case and then decide whether the customary practice of disclosing the plaintiff's identity should yield to the plaintiff's privacy concerns." Doe v. Sheely, 781 F.App'x 972, 974 (11th Cir. 2019), *citing* Doe v. Frank 951 F.2d 320, 323 (11th Cir. 1992).

However, in this case, the District Court erred by *limiting* its assessment of whether Plaintiff's privacy interests warrant anonymity to those six factors, rather

than using those six factors as a *starting point* for considering *all* the circumstances of the Complaint below. *See* DKT. 26 at 5, stating:

> "Thus, the Court agrees with the Magistrate Judge that four of the six factors weigh against Plaintiff's position that, considering the totality of the circumstances, Plaintiff has not overcome the Federal Rule of Civil Procedure 10's presumption of openness. The Magistrate Judge's findings were therefore not clearly erroneous or contrary to law...."

Id.

A significant (and distinct) factor of the instant Complaint that the District Court did not weigh is that Plaintiff's Complaint in the court below is bound up in an administrative proceeding that preceded the District Court Complaint, and which resulted in a published appellate decision divulging not just Tessa's epilepsy status, but other significant personal details about the Plaintiff—and which proceeded anonymously and relied on such anonymity, based on the Privacy Act,[28] in publishing that information.[29] If Plaintiff is denied the anonymity she requested in her Complaint in the District Court, Plaintiff's confidentiality and anonymity on which the EEOC relied to comply with restrictions under the Privacy Act in publishing private details about Plaintiff in its appellate decision would be

[28] *See* U.S. Equal Employment Opportunity Commission, "Open Government Plan," Version 4.0, July 2016. Available at: https://www.eeoc.gov/us-equal-employment-opportunity-commission-eeoc-open-government-plan (accessed July 31, 2024)

[29] NOTE: The District Court likewise disregarded the fact that EEOC published an appellate decision in the administrative proceeding that preceded the Complaint below, holding the Defendant liable for discrimination and retaliation, in assessing whether Plaintiff's anonymity in the (District Court) Complaint would pose a unique threat of fundamental unfairness to the defendant. *See* DKT 4 at 12.

unraveled. Indeed, the First Circuit stated that whether a complaint is bound up with a prior proceeding that was made private pursuant to law is an important factor for courts to consider in weighing requests for anonymity, noting "This concern manifests itself when denying anonymity in the new suit would significantly undermine the interests served by that confidentiality." Doe v. MIT, 46 F.4th 61 at 72 (1st Cir. 2022).

An additional example of the District Court failing to actually weigh all the circumstances of Plaintiff's Complaint, the District Court did not address Plaintiff's concern that if not granted anonymity in her Complaint in the District Court, she would suffer harm similar to and rivaling the very harm from the discrimination and retaliation that Plaintiff seeks to remedy through her Complaint. It is evident that the District Court did not actually weigh all the circumstances of the instant Complaint in denying Tessa's motion to proceed anonymously in this Complaint, and thus abused its discretion.

B. The District Court did not apply the legal standard this Court set forth when denying Plaintiff anonymity despite the widely-acknowledged stigma surrounding epilepsy

As noted previously, this Court has held that stigma attached to a plaintiff's disclosure may justify anonymity. As this Court noted in Doe v. Neverson,

> [T]he district court failed to consider that, in other cases, we have held that "social stigma" is sufficient to warrant proceeding anonymously. As we have explained, "[c]ourts have permitted plaintiffs to proceed anonymously in cases involving mental

> illness, homosexuality, and transsexuality" because "the social stigma attached to the plaintiff's disclosure was found to be enough to overcome the presumption of openness in court proceedings."

Id., 820 Fed. Appx. 984, 988 (11th Cir. 2020) *citing* Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992).

In the instant case, however, the District Court first, in the Magistrate's initial denial of Plaintiff's motion to proceed anonymously, chalked up the (severe) widely-acknowledged stigma surrounding epilepsy to embarrassment. DKT 4 at 8-10. Thereafter, when the District Court acknowledged (in DKT 26) that there is stigma surrounding epilepsy, instead of applying the Court's aforementioned decisions in Doe v. Neverson and Doe v. Frank, permitting anonymity in cases where stigma is associated with public disclosure, District Court faulted Plaintiff for failing to cite a case where a court held specifically that epilepsy is information of "utmost intimacy". This is despite it appearing as though no other case before the instant one has expressly addressed whether one's epilepsy diagnosis/status constitutes information of "utmost intimacy".[30] The District Court thus abused its discretion by misapplying the legal standard set forth by this Court in denying Plaintiff anonymity due to the severe stigma surrounding her epilepsy.

[30] *As Plaintiff previously noted*, her searches across legal databases using the terms "epilepsy" and "utmost intimacy" yielded the District Court's orders in the instant Complaint, DKT 4 and DKT 26, as appearing to be the first case where a court has directly addressed whether one's epilepsy status is information of the "utmost intimacy."

CONCLUSION

For the reasons set forth above, Plaintiff-Appellant Tessa G. respectfully requests that this Court VACATE and REVERSE on remand the District Court's orders denying Plaintiff's motion for leave to proceed anonymously in the Complaint.

Respectfully submitted,

/s/ [redacted] a/k/a Tessa G.
Plaintiff-Appellant, *Pro Se*
Phone: (404) 939-2076
Email: alias.tessa.g@gmail.com

CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 7,363 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FRAP 32(a)(5) because the brief uses proportionately-spaced, 14-point Times New Roman typeface.

/s/ [redacted] a/k/a Tessa G.

Plaintiff-Appellant, *Pro Se*

CERTFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing PLAINTIFF-APPELLANT TESSA G. MOTION FOR LEAVE TO FILE CORRECTED OPENING BRIEF OUT OF TIME as well as the OPENING BRIEF OF APPELLANT TESSA G. with the United States Court of Appeals for the Eleventh Circuit by using the ECF system on August 5, 2024.

I also served a courtesy copy of foregoing directly on the Defendant via electronic mail on August 5, 2024 at Melaine.Williams@usdoj.gov.

/s/ [redacted] a/k/a Tessa G.

Plaintiff-Appellant, *Pro Se*